John Hancock Life Insurance (Malaysia) Bhd v Menteri Sumber Manusia Malaysia and Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R1–25–30 OF 2002
FAIZA TAMBY CHIK J
23 APRIL 2003

Labour Law — Employment — Dismissal — Dismissal without just cause — Second respondent was President, Chief Executive Officer and Managing Director of applicant — Second respondent removed from his positions by passing of shareholders' ordinary resolutions at extraordinary general meeting — Whether second respondent was 'workman' — Whether removal by shareholders taken by way of resolution of general meeting of company amounted to a 'dismissal' within meaning of s 20 of Industrial Relations Act 1967

Labour Law — Industrial Court — Jurisdiction — Threshold jurisdiction — Jurisdiction to enter and hear reference — Whether Minister of Human Resources had duty to decide issue of threshold jurisdiction of Industrial Court — Whether Minister omitted to deal with specific threshold jurisdiction issue posed — Whether Minister's decision to refer representation to Industrial Court liable to be quashed by court — Industrial Relations Act 1967 s 20

The second respondent was the President, Chief Executive Officer and Managing Director of the applicant and a member of the applicant's board of directors. The second respondent was removed from his positions by the passing of two shareholders' ordinary resolutions at the applicant's Extraordinary General Meeting ('EGM'). Following his removal by the shareholders, the second respondent lodged a representation under s 20(1) of the Industrial Relations Act 1967 ('the Act') that he had been dismissed 'without just cause or excuse'. At the conciliation proceedings, the applicant submitted a written representation and raised the following issues as to why the second respondent's representation should not be referred to the third respondent ('the Industrial Court'): (a) whether the second respondent can properly be classified a 'workman' within the meaning of s 20 of the Act; and (b) whether the second respondent, having been removed by way of two resolutions passed at an EGM can challenge such removal by way of a reference under s 20 of the Act. The Minister of Human Resources (the first respondent) ('the Minister') decided to refer the second respondent's representation to the Industrial Court. This was the applicant's application pursuant to O 53 r 3 of the Rules of the High Court 1980 for: (a) an order of certiorari to move into this court for the purpose of quashing the decision of the Minister to refer the second respondent's representation under s 20(1) of the Act to the Industrial Court for an award; (b) an order of prohibition to prevent the Industrial Court from adjudicating the representation of the second respondent under the Act; and (c) an order that all proceedings against the applicant in the Industrial Court be stayed pending the hearing and final determination of these proceedings for leave and the application for substantive reliefs thereto.

Held, allowing the applications:

(1) Before the Industrial Court can hear a reference for dismissal without just cause or excuse under s 20 of the Act, it must possess the requisite jurisdiction to enter and hear such reference. This jurisdiction was

commonly referred to as 'the threshold jurisdiction' of the Industrial Court, that is, the jurisdiction to enter into the inquiry. Therefore, unless the Industrial Court possessed the requisite 'threshold jurisdiction', it may not enter and hear the reference as, to do so, would be to exceed its jurisdiction under the Act (see paras 4 and 5).

(2) The Minister had the duty to decide the issue of threshold jurisdiction of the Industrial Court under the provisions of s 20 of the Act. Therefore, any challenge to the threshold jurisdiction of the Industrial Court must be taken by way of challenge to the decision of the Minister's act in referring the dispute to the Industrial Court and not otherwise. If the Minister, in carrying out that duty either wrongly decided the threshold jurisdiction question or failed to decide such question properly or at all, his decision may be quashed in judicial review proceedings in the High Court (see paras 5, 6 and 7); *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 followed; *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 distinguished.

(3) In determining whether the Minister had correctly decided the issue of threshold jurisdiction, the test that should properly be applied was whether the Minister had acted 'lawfully' in coming to his decision. If, therefore the applicant can establish: (a) that there was an outright refusal by the Minister to consider a relevant matter; (b) misdirection by the Minister on a point of law; (c) the Minister took into account a wholly irrelevant or extraneous consideration; or (d) the Minister omitted to take into account a relevant consideration, the Minister's decision to refer the representation to the Industrial Court was liable to be quashed by the court (see paras 12 and 13).

(4) In the instant case, it was clear from the Minister's affidavit in reply that he had completely omitted to deal with and decide on the specific threshold jurisdiction issue posed, namely, whether the second respondent, having been removed by way of two resolutions passed at the EGM, can challenge the removals by way of reference under s 20 of the Act. This issue was specifically raised in the applicant's written representation at the conciliation proceedings. The failure by the Minister to consider and determine this issue was a clear error of jurisdiction on the Minister's part which in itself, necessitated intervention by this court. Had the Minister properly directed himself to the issue, he would have concluded that the Industrial Court had no jurisdiction to determine a removal by way of vote of shareholders (see para 14); *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 followed.

(5) Section 20 of the Act empowered the Industrial Court to adjudicate a 'dismissal' between an 'employer' and a 'workman'. This section did not, on its express terms, entitle the Industrial Court to enquire into and adjudicate upon what was essentially an issue of company law, namely, the rights of shareholders to remove a director and/or officer of a company and enquire into the basis or otherwise of such decision taken at such meeting of shareholders of a company. Such a removal by shareholders taken by way of resolution of a general meeting of a company

cannot amount to a 'dismissal' within the meaning of s 20 of the Act (see paras 15 and 16).

(6) If the Industrial Court were to treat the removal of the second respondent as a 'dismissal', in law, the Industrial Court would be under a duty to inquire into the question of whether such dismissal was without just cause or excuse under s 20 of the Act. Here, the removal of the second respondent from his positions was by shareholders exercising their right to vote at the EGM. In law, the shareholders were under no duty to furnish a reason for voting for or against a particular resolution tabled at a general meeting (see paras 17 and 18).

(7) In bringing a claim under s 20 of the Act, a claimant must seek an order of reinstatement as otherwise, he cannot maintain such an action. An order of reinstatement was incompatible with the scheme set out in the Companies Act 1965 that shareholders must be allowed to determine the affairs of a company including any question on the removal of an officer or director. Any award of reinstatement would negate such principle which was well established in company law and compel the shareholders, against the wishes expressed by way of a vote at a general meeting to re-engage an officer or director they had deemed should be removed. In the circumstances, the Industrial Court would be exceeding its jurisdiction if it was allowed to hear the reference (see para 19).

(8) As to the threshold jurisdiction issue posed to the Minister, namely, whether the second respondent was a 'workman' or not, it was clear from the Minister's affidavit that he had misdirected himself in law in deciding that the issue of the workman 'can only be determined by the Industrial Court'. The Industrial Court may only proceed to adjudicate a representation by a 'workman' within the meaning of the Act. If the complainant was not a 'workman', then the Industrial Court cannot proceed to hear the reference, as to do so would be to act in excess of jurisdiction. This was a threshold jurisdiction issue which must be determined prior to the Industrial Court embarking upon its enquiry into the merits of the dismissal complaint. The Minister, in coming to his decision, proceeded to take into account matters which were not relevant to the question of the threshold jurisdiction of the Industrial Court, particularly when the Minister concluded that 'the dismissal of the second respondent was not made on grounds supported by convincing evidence to show that the second respondent was responsible for the reduction of the company's business'. That issue, which was a matter for shareholders at the meeting to decide, clearly was extraneous to the legal threshold jurisdiction question and the Minister, by alluding to the same as a basis for reference to the Industrial Court, had clearly exceeded his jurisdiction. If the Minister had properly directed himself in law, he would come to the conclusion that the second respondent was not a 'workman' under the Act (see para 20). *Kathirvelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 followed

(9) If the 'control' test were to be applied to the position of the second respondent, then it can be seen that the second respondent cannot be considered a 'workman'. It was undisputed that the second respondent

was not subject to any form of detailed control as to the manner in which he exercised his functions and responsibilities as president, chief executive officer, managing director and director of the applicant. The discretion was left to the second respondent as to the manner in which he discharged his responsibilities in the applicant (see para 20). *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 followed.

(10) The Minister had taken the 'control' test as the sole and exclusive test in seeking to determine the 'workman' issue. This was incorrect since the Federal Court, in *Hoh Kiang Ngan* itself, recognised that the control test was 'an important factor although it may not be the sole criterion' and that it was necessary to determine 'all features of the engagement' in determining whether a person was a workman or not. In the instant case, the Minister had fallen into error on the issue by referring and relying on the terms of the written contract of the second respondent which dealt with such issues such as basic pay, probation, increment, annual leave, employee's provident fund contributions, retirement benefits and notice of termination when those matters did not go to the important question of duties and functions of the second respondent's engagement. That question can only be determined by examining the role of the second respondent in the running and management of the applicant's organisation as its president and chief executive officer. Further, the role, duties and functions of the second respondent were not set out in any detail in the written contract of the second respondent but were set out in the applicant's affidavit. From a reading of the Minister's submission, he had omitted to consider these key features which showed the second respondent had full control over the day to day running and operation of the applicant and was also instrumental in the formulation and implementation of policies with limited reporting to the applicant's board of directors on such issues (see para 27).

(11) The Minister had a duty, in law, to consider and decide all questions pertaining to the threshold jurisdiction of the Industrial Court. When such questions of threshold jurisdiction were raised by a party under s 20 of the Act, the Minister must specifically address and decide the questions and such decision must be correct in law. In the instant case, the Minister failed to decide the specific questions of threshold jurisdiction posed to him and further misdirected himself, in law, of the threshold jurisdiction posed and took into account irrelevant matters in making his decision (see para 30).

[Bahasa Malaysia summary

Responden kedua adalah presiden, ketua pegawai eksekutif dan pengarah urusan responden dan ahli lembaga pengarah responden. Responden kedua telah disingkirkan dari jawatannya melalui dua ketetapan biasa pemegang-pemegang syer yang diluluskan di dalam mesyuarat agung luar biasa ('MAL') pemohon. Berikutan dengan penyingkiran responden kedua oleh pemegang saham, responden kedua telah membuat representasi dibawah s 20(1) Akta Perhubungan Perusahaan 1967 ('Akta itu') bahawa dia telah dipecat 'without

just cause or excuse'. Semasa persidangan perdamaian, pemohon mengemukakan satu representasi bertulis dan membangkitkan isu-isu beikut mengapa representasi responden kedua tidak patut dirujuk kepada responden ketiga ('Mahkamah Perusahaan'): (a) sama ada responden kedua boeh diklasifikasikan sebagai seorang 'workman' di dalam maksud s 20 Akta itu; dan (b) sama ada responden kedua, setelah disingkirkan oleh dua representasi yang diluluskan pada MAL boleh mempertikaikan penyingkiran itu melalui rujukan di bawah s 20 Akta itu. Menteri Sumber Manusia (responden pertama) ('Menteri itu') membuat keputusan untuk merujuk representasi pemohon kedua ke Mahkamah Perusahaan. Ini adalah permohonan pemohon di bawah A 53 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk: (a) Satu perintah certiorari untuk memohon kepada mahkamah untuk membatalkan keputusan Menteri untuk merujuk representasi responden kedua dibawah s 20(1) Akta ke Mahkamah Perusahaan untuk satu award; (b) perintah larangan untuk menahan Mahkamah Perusahaan daripada mendengarbicara representasi responden kedua di bawah Akta; dan (c) satu perintah bahawa semua prosiding terhadap pemohon diMahkamah Perusahaan ditangguh sementara perbicaraan dan penyelesaian prosiding untuk kebenaran dan permohonan untuk relif substantif.

Diputuskan, membenarkan permohonan-permohonan itu:

(1) Sebelum Mahkamah Perusahaan boleh mendengar suatu rujukan untuk pemecatan tanpa tujuan atau alasan yang adil di bawah s 20 Akta itu, ia mesti mempunyai bidangkuasa yang diperlukan untuk memasukki dan mendengar rujukan sedemikian. Bidangkuasa ini selalunya dirujuk sebagai had bidangkuasa Mahkamah Perusahaan, iaitu, bidangkuasa untuk memulakan perbicaraan. Oleh itu, kecuali Mahkamah Perusahaan mempunyai had bidangkuasa, ia tidak dapat mendengar rujukan itu, kerana dengan berbuat begitu, ia akan melebihi bidangkuasanya di bawah Akta itu (lihat perenggan 4 dan 5).

(2) Menteri mempunyai tanggungjawab untuk membuat keputusan isu had bidangkuasa Mahkamah Perusahaan di bawah peruntukan s 20 Akta tersebut. Oleh itu, untuk mencabar bidangkuasa Mahkamah Perusahaan mestilah melalui cabaran terhadap keputusan Menteri untuk merujuk pertikaian itu ke Mahkamah Perusahaan bukan sebaliknya. Jika Menteri, dalam menjalankan tanggungjawabnya sama ada salah memutuskan soalan had bidangkuasa atau gagal untuk memutuskan soalan sedemikian dengan betul atau tidak sama sekali, keputusan beliau mungkin dibatalkan dalam prosiding kajian semula kehakiman diMahkamah Tinggi (lihat perenggan 5, 6 dan 7); *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 diikut; *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 dibeza.

(3) Dalam menentukan sama ada Menteri telah memutuskan isu bidangkuasa ambang dengan betul, ujian yang patut diguna adalah sama ada Menteri telah bertindak 'lawfully' apabila membuat keputusannya. Jika, pemohon boleh membuktikan: (a) bahawa ada keengganan terus terang oleh Menteri untuk membuat pertimbangan perkara relevan; (b) salah araholeh Menteri mengenai perkara undang-undang; (c) Menteri mengambilkira pertimbangan yang tidak relevan atau yang tidak berkait; atau (d) Menteri gagal mengambilkira pertimbangan yang relevan,

keputusan Menteri untuk merujuk representasi ke Mahkamah Perusahaan boleh dibatalkan oleh mahkamah (lihat perenggan 12 dan 13)

(4) Dalam kes ini, ia jelas daripada afidavit jawapan Menteri bahawa beliau sama sekali telah gagal membincangkan dan membuat keputusan mengenai isu bidangkuasa ambang yang dikemukakan, khasnya, sama ada responden kedua, yang telah disingkirkan melalui dua penetapan yang diluluskan pada MAL, boleh mencabar penyingkirannya melalui rujukan dibawah s 20 Akta. Isu ini khas dibangkitkan dalam representasi bertulis pemohon di mesyuarat pendamaian. Kegagalan Menteri untuk mengambilkira dan menentukan isu ini adalah kekhilafan bidangkuasa pada pihak Menteri yang dengan sendirinya memerlukan campur tangan mahkamah ini. Sekiranya Menteri mengarahkan dirinya sendiri terhadap isu itu dengan betul, beliau akan membuat kesimpulan bahawa Mahkamah Perusahaan tidak ada bidangkuasa untuk menentukan penyingkiran melalui undi pemegang saham (lihat perenggan 14); *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 diikut.

(5) Seksyen 20 Akta tersebut memberikan kuasa kepada Mahkamah Perusahaan untuk menghukumkan 'dismissal' di antara 'employer' dan 'workman'. Seksyen ini tidak, pada terma nyata, memberi hak kepada Mahkamah Perusahaan untuk menyiasat dan menghukum apa yang sememangnya adalah isu undang-undang syarikat, iaitu hak pemegang saham untuk menyingkirkan seorang pengarah dan/atau pegawai syarikat dan menyiasat ke dalam dasar atau sebaliknya keputusan yang diambil di mesyuarat pemegang-pemegang syer syarikat. Penyingkiran sedemikian oleh pememang-pemegang syer yang diambil melalui ketetapan mesyuarat agung syarikat tidak bererti 'dismissal' dalam linkungan s 20 Akta tersebut (lihat perenggan 15 dan 16).

(6) Jika Mahkamah Perusahaan menganggap penyingkiran responden sebagai 'dismissal', di sisi undang-undang, Mahkamah Perusahaan akan bertanggungjawab untuk menyiasat sama ada penyingkiran itu adalah tanpa tujuan dan alasan yang adil di bawah s 20 Akta itu. Di sini penyingkiran responden kedua dari jawatan-jawatan beliau adalah melalui penggunaan hak pemegang-pemegang syer untuk mengundi di MAL. Di sisi undang-undang pemegang-pemegang syer tidak mempunyai tanggungjawab untuk memberi alasan kerana mengundi untuk atau terhadap ketetapan khusus yang dikemukakan pada mesyuarat agung (lihat perenggan 17 dan 18).

(7) Di dalam membawa satu tuntutan di bawah s 20 Akta itu, seorang penuntut mesti memohon satu perintah pengembalian semula sebab jika sebaliknya, beliau tidak dapat mengekalkan tindakan itu. Satu perintah pengembalian semula tidak sesuai dengan skema seperti di dalam Akta Syarikat 1965 bahawa pemegang-pemegang syer mesti dibenarkan menentukan urusan syarikat termasuk persoalan penyingkiran pegawai atau pengurus. Sebarang award pengembalian semula akan mensia-siakan prinsip yang telah mantap di dalam undang-undang syarikat dan memaksa pemegang-pemegang syer, bercanggah dengan niat oleh undi di dalam mesyuarat agung untuk mengambil semula seorang pegawai

atau pengurus yang dikehendaki disingkir. Di dalam keadaan ini, Mahkamah Perusahaan akan melebihi bidangkuasanya jika ia dibenarkan mendengar rujukan itu (lihat perenggan 19).

(8) Mengenai isu had bidangkuasa yang dikemukakan kepada Menteri, iaitu, sama ada responden kedua adalah 'workman' atau tidak, ia adalah jelas daripada affidavit Menteri bahawa beliau telah salah arahkan dirinya di sisi undang-undang dalam memutuskan bahawa isu pekerja 'can only be determined by the Industrial Court'. Mahkamah Perusahaan hanya boleh terus mendengarbicara satu representasi oleh seorang 'workman' di dalam maksud Akta itu. Jikalau pengadu bukan seorang 'workman', Mahkamah Perusahaan tidak dapat mendengar rujukan itu, sebab jika ia mendengar rujukan itu ia akan melebihi bidangkuasanya. Ini adalah isu had bidangkuasa yang mesti ditentukan sebelum Mahkamah Perusahaan dapat memulakan siasatannya ke dalam merit-merit aduan pemecatan. Menteri, di dalam mencapai keputusannya, telah mempertimbangkan perkara-perkara yang tidak relevan kepada persoalan had bidangkuasa Mahkamah Perusahaan, khususnya apabila Menteri memutuskan bahawa 'the dismissal of the second respondent was not made on grounds supported by convincing evidence to show that the second respondent was responsible for the reduction of the company's business'. Isu itu, yakni perkara untuk diputuskan oleh pemegang-pemegang syer di mesyuarat, jelas terkeluar daripada persoalan had bidangkuasa dan Menteri, dengan menyentuh kepada yang sama sebagai dasar rujukan kepada Mahkamah Perushaan, jelas telah melebihi bidangkuasanya. Jika Menteri telah mengarahkan dirinya dengan betul di sisi undang-undang, beliau akan membuat kesimpulan bahawa responden kedua bukan seorang 'workman' di bawah Akta itu (lihat perenggan 20); *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 diikut.

(9) Jikalau ujian 'control' dipakai kepada jawatan responden kedua, ia akan dapat dilihat bahawa responden kedua bukan 'workman'. Tidak dipertikaikan bahawa responden kedua tidak ditakluk oleh kawalan yang terperinci ke atas cara beliau melaksanakan fungsi-fungsi dan tanggungjawab-tangungjawab beliau sebagai presiden, ketua pegawai eksekutif, ketua pengarah dan pengarah pemohon. Budibicara itu telah diberi kepada responden kedua mengenai cara beliau melaksanakan tanggungjawab beliau di dalam pemohon (lihat perenggan 20); *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 diikut.

(10) Menteri telah menggunakan ujian 'control' sebagai ujian tunggal daneksklusif di dalam menentukan isu 'workman'. Ini tidak betul memandangkan Mahkamah Persekutuan di dalam kes *Hoh Kiang Ngan* mengiktirafkan bahawa ujian kawalan adalah 'an important factor although it may not be the sole criterion' dan bahawa ia adalah perlu untuk menentukan 'all features of the engagement' di dalam menentukan sama ada seorang itu adalah pekerja atau tidak. Di dalam kes ini, Menteri telah khilaf pada isu dengan merujuk dan bergantung kepada terma-terma perjanjian bertulis responden kedua yang berkait dengan isu-isu seperti gaji, percubaan, kenaikan tahunan, cuti tahunan, caruman

kumpulan wang simpanan pekerja, faedah persaraan, dan notis pemecatan memandangkan perkara-perkara itu tidak menjawab persoalan penting tangungjawab dan fungsi-fungsi pengambilan responden kedua. Persoalan itu hanya dapat ditentukan dengan meneliti fungsi responden kedua di dalam pengurusan organisasi pemohon sebagai presidennya dan ketua pegawai eksekutif. Seterusnya, peranan, tanggungjawab dan fungsi responden kedua tidak dikemukakan dengan teliti di dalam perjanjian bertulis responden kedua tetapi telah dikemukakan di dalam affidavit pemohon. Daripada bacaan hujahan Menteri, beliau tidak mempertimbangkan sifat-sifat penting yang menunjukkan bahawa responden kedua mempunyai kawalan penuh ke atas pengurusan harian dan operasi pemohon dan juga adalah penting di dalam pembentukan dan pelaksanaan polisi-polisi dengan laporan terhad kepada lembaga pengarah di atas isu-isu seperti itu (lihat perenggan 27).

(11) Menteri mempunyai tanggungjawab, di sisi undang-undang untuk mempertimbangkan dan memutuskan persoalan-persoalan mengenai bidangkuasa ambang Mahkamah Perusahaan. Apabila persoalan bidangkuasa ambang seperti itu dibangkitkan oleh parti di bawah s 20 Akta itu, Menteri itu mesti memberi perhatian kepada dan memberi keputusan kepada persoalan-persoalan itu dan keputusan itu mesti betul di sisi undang-undang. Di dalam kes ini, Menteri gagal memberi keputusan kepada persoalan bidangkuasa ambang yang dikemukakan kepadanya dan juga telah salah arahkan dirinya, di sisi undang-undang bidangkuasa ambang yang dikemukakan dan telah mempertimbangkan perkara-perkara yang tidak relevan di dalam membuat keputusannya (lihat perenggan 30).]

Notes

For cases on jurisdiction of the Industrial Court, see 8(1) *Mallal's Digest* (4h Ed, 2003 Reissue) paras 1323-1375.

For cases on dismissal, see 8(1) *Mallal's Digest* (4th Ed ,2003 Reissue) paras 849–873.

For threshold jurisdiction of the Industrial Court, see 7 *Halsbury's Laws of Malaysia*, para [120.090].

For just cause or excuse, see 7 *Halsbury's Laws of Malaysia*, para [120.091].

Cases referred to

Association Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223 (refd)

Assunta Hospital v Dr A Dutt [1980] 1 MLJ 96

Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685 (folld)

Enesty Sdn Bhd v Transport Workers Union & Anor [1986] 1 MLJ 18 (distd)

Goon Kwee Phoy v J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (folld)

Holiday Inn, Kuching v Lee Chai Siok Elizabeth [1992] 1 MLJ 230 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Inchcape Malaysia Holding Bhd v RB Gray & Anor [1985] 2 MLJ 297 (refd)

Kuala Lumpur Mutual Fund Bhd v J Bastian Leo & Anor [1988] 2 MLJ 526 (refd)
Life Insurance Corporation v Escorts Ltd & Ors AIR 1986 SC 1370 (refd)
Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia [1999] 2 MLJ 337 (folld)
Minister of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9 (refd)
Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal [1991] 1 MLJ 24 (refd)
Northern Counties Securities Ltd v Jackson & Steeple Ltd [1974] 2 All ER 625 (refd)
Padfield and others v Minister of Agriculture, Fisheries and Food and others [1968] AC 997 (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd & other appeals [1996] 1 MLJ 661 (refd)

Legislation referred to

Companies Act 1965
Industrial Relations Act 1967 ss 9, 20, (1)
Rules of the High Court 1980 O 53 r 3

Romesh Abraham (Steven Thiru and Maizura wit him) (Shook Lin & Bok) for the appellant.
Mahamad Naser bin Desa (Attorney-General's Chambers) for the first respondent.
N Sivabalah (Raymond TC Low with him) (Shearn Delamore & Co) for the second respondent.

Faiza Tamby Chik J:

[1] This is an application pursuant to O 53 r 3 of the Rules of the High Court 1980 for the following Orders:

(i) For an order of certiorari to move into this court for the purpose of quashing the decision of the first respondent made on 21 February 2002 to refer the second respondent's representation under s 20(1) of the Industrial Relations Act 1967 ('the Act') to the third respondent for an Award;

(ii) For an order of prohibition to prevent the third respondent from adjudicating the aforesaid representation of the second respondent under the said Act;

(iii) All proceedings against the applicant abovenamed in the third respondent be stayed pending the hearing and final determination of these proceedings for leave and the application for substantive relief's thereto.

[2] The facts giving rise to the application are set out in detail in the affidavit of Shahridan Mohd Sa'aid affirmed on 4 April 2002 in support of the application ('the applicant's affidavit') at paras 5 to 18 thereof in summary, the material facts are as follows:

(a) The second respondent was the President, Chief Executive Officer, Managing Director of the applicant and member of the Board of

Directors of the applicant, a licensed insurance company listed on the main board of the Kuala Lumpur Stock Exchange. The duties, functions and powers of the second respondent are fully set out in paras 10 to 15 of the applicant's affidavit;

(b) On 5 January 2001, the second respondent was removed from his said positions by the passing of two shareholder's ordinary resolutions at an Extraordinary General Meeting of the applicant. The meeting was convened by the Board of Directors of the applicant by resolution of the Board dated 17 November 2002;

(c) Following his removal by shareholders at the Extraordinary General Meeting of the applicant, the second respondent lodged a representation under s 20(1) of the said Act that he had been dismissed 'without just cause or excuse'.

(d) At the conciliation proceedings, the applicant submitted a written representation (exh 'SMS 10' to the applicant's affidavit) and raised two issues as to why the second respondent's representation should not be referred to the Industrial Court and, particularly, that the Industrial Court had no jurisdiction to hear the reference pertaining to the second respondent's complaint. The two issues raised were:

(i) whether the second respondent can properly be classified a 'workman' within the meaning of s 20 of the said Act; and

(ii) whether the second respondent, having been removed by way of two resolutions passed at an Extraordinary General Meeting of the applicant can challenge such removal by way of a reference under s 20 of the said Act;

(e) By letter dated 21 February 2002 (exh 'SMS–11' of the applicant's affidavit), the applicant was informed by the Director-General of Human Resources that the first respondent Minister had decided to refer the second respondent's representation to the Industrial Court (the third respondent in these proceedings);

(f) The applicant, thereafter, filed an application for, inter alia, leave to quash the decision of the respondent Minister and also to prohibit the Industrial Court from hearing the reference. The order for leave was granted by High Court on 3 May 2002.

(g) The present application is being opposed by both the first and second respondents who have filed affidavits affirmed on 18 October 2002 and 23 October 2002 respectively and to which the applicant has responded by affidavits affirmed on 20 November 2002;

(h) On 23 September 2002, the court directed parties to file written submissions on the application.

[3] The question for determination by this court on this application is whether the first respondent Minister, in deciding to refer the second respondent's representation to the Industrial Court under s 20 of the said Act, acted in excess of his powers and, if so, that this decision should be

quashed by way of the orders sought in this application. In determining this question, it is necessary to consider the following issues:

(a) The jurisdiction of the Industrial Court to enter into and adjudicate a reference under s 20 of the said Act '(the threshold jurisdiction of the Industrial Court)';

(b) The duty of the first respondent Minister to determine the threshold jurisdiction of the Industrial Court;

(c) The legal grounds upon which the first respondent Minister's decision to determine the issue of threshold jurisdiction of the Industrial Court may be challenged in judicial review proceedings in the High Court; and

(d) Whether the first respondent Minister, in the present instance, correctly decided the issue of threshold jurisdiction of the Industrial Court in referring the second respondent's representation to the Industrial Court.

[4] I think before the Industrial Court can hear a reference for dismissal without just cause or excuse under s 20 of the said Act, it must possess the requisite jurisdiction to enter and hear such reference. This jurisdiction is commonly referred to as 'the threshold jurisdiction' of the Industrial Court ie the jurisdiction to enter into the inquiry and was explained in the following terms in the Supreme Court decision of *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 at pp 692–693:

> At the heart of this appeal lies the important difference between the class of cases where there is lack of authority on the part of a public decision-maker to enter upon an inquiry and the class of cases where there is such authority, but the decision-maker exceeds the bounds of his decision-making power because of something he does or fails to do in the course of the inquiry. The former is termed 'threshold jurisdiction' in recognition of a public decision-maker's inability to cross the threshold, as it were, and enter upon the inquiry in question. It is jurisdiction in the narrow sense.
>
> The latter class concerns jurisdiction in the wider sense and is generally called '*Anisminic* jurisdiction' … .

[5] Therefore unless the Industrial Court possesses the requisite 'threshold jurisdiction', it may not enter and hear the reference as, to do so, would be to exceed its jurisdiction under the said Act. In the instant case, the applicant raised two specific threshold jurisdiction issues why the Industrial Court may not proceed to enter and hear the reference. These questions of 'threshold jurisdiction' must be determined before the Industrial Court proceeds with any enquiry on the merits, as otherwise, the Industrial Court would be acting in excess of jurisdiction in hearing the reference. The question which, therefore, needs to be considered is, who has the duty to decide the issue of threshold jurisdiction of the Industrial Court under the provisions of s 20 of the said Act. I am of the view that based on the current case authorities, the duty lies solely upon the first respondent Minister. Prior to the Supreme Court decision in *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685, it was commonly accepted that the Industrial Court could itself decide questions of threshold jurisdiction by way of ruling on a preliminary objection taken at the Industrial Court itself. In *Kathiravelu Ganesan & Anor* however, the Supreme Court held that the question of threshold jurisdiction arises by

virtue of the act of the reference of the Minister in referring a dispute to the Industrial Court and that it was that act of reference, by the Minister, which conferred the requisite jurisdiction on the Industrial Court to enter and hear the reference. In its judgment, the Supreme Court in *Kathiravelu Ganesan & Anor* stated as follows at pp 694-695:

> But the act of the Minister making the reference has, as will be seen in a moment, jurisdictional consequences. The decision to refer or not to refer a dispute is therefore a separate and distinct act that may be questioned in judicial review proceedings.
>
> Fourth and last, the adjudicatory level. It is important to observe that, save in very exceptional cases which are not relevant to the present discussion, the Industrial Court, unlike the ordinary courts, is not available for direct approach by an aggrieved party. Access to it may only be had through the three levels earlier adverted to. The Industrial Court is therefore empowered to take cognizance of a trade dispute and adjudicate upon it only when the Minister makes a reference. In other words, it is the reference that constitutes threshold jurisdiction.
>
> Once it is seized of the dispute in the threshold sense, the Industrial Court, unlike the authorities at the preceding three levels, is empowered to determine whether it has the wider jurisdiction to entertain the workman's claim. Thus, for example, it has jurisdiction to decide whether the particular claimant is a workman or whether a dispute is extra-territorial in nature. This is sometimes referred to as 'the jurisdiction to decide whether there is jurisdiction'.

[6] It follows therefore from the decision of the Supreme Court in *Kathiravelu Ganesan & Anor* (which represents the present position of the law) that any challenge to the threshold jurisdiction of the Industrial Court must be taken by way of challenge to the decision of the Minister's act in referring the dispute to the Industrial Court and not otherwise. This was categorically set out by the Supreme Court in *Kathiravelu Ganesan & Anor* in the following terms at p 699:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

[7] It follows from the decision in *Kathiravelu Ganesan & Anor* that where a party challenges the threshold jurisdiction of the Industrial Court the duty to decide such question must necessarily fall on the first respondent Minister and not the Industrial Court. If, therefore the first respondent Minister, in carrying out that duty either wrongly decides the threshold jurisdiction question or fails to decide such question properly or at all, his decision may be quashed in judicial review proceedings in the High Court.

[8] The second respondent appears to take the position that the Minister has no authority, in law, to decide the threshold jurisdiction of the Industrial Court. This startling proposition is not only based on a complete misreading of the case of *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2MLJ 685, but also directly contrary to the pronouncement in that case which specifically held that the Minister's reference to the Industrial Court must be directly challenged in judicial review proceedings if the threshold jurisdiction of the Industrial Court is in issue. It is only when no such challenge is taken should the Industrial Court be allowed to hear the reference to its completion and decide any jurisdictional questions posed in the process. This is clear from the passage in *Kathiravelu Ganesan & Anor* cited by the respondent himself which states as follows at p 699:

> Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question eg whether the particular claim is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction.

[9] In the instant case, a challenge to the Minister's powers of reference has been taken by the applicant. It is therefore, incumbent on the first respondent Minister to explain why he rejected the applicant's challenge and also to give proper reasons, on affidavit, for taking that course of action. This, the first respondent Minister has failed to do so. It is, therefore, incorrect to refer to decisions such as *Enesty Sdn Bhd v Transport Workers Union & Anor* [1986] 1 MLJ 18 when that case was not concerned with challenging the Minister's reference under s 20 but instead concerned with a preliminary objection taken at the Industrial Court itself on a threshold jurisdiction issue. It is equally incorrect to suggest that the Minister, in exercising his powers under s 20 of the Act, carries out a purely 'administrative' function or that the case of *Assunta Hospital v Dr A Dutt* [1980] 1 MLJ 96 cited by the second respondent is authority for that proposition. On the contrary, the Court of Appeal, in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 at p 511 categorically rejected the argument in the following terms:

> Let me say at once that I have no difficulty in rejecting this argument. It is quite clear that the section under consideration gives a choice. He may either refer the representations to the Industrial Court or he may refuse to do so. When he settles upon the particular course that appeals to him, he makes a decision. He decides whether the matter should go further or should terminate at his level. The exercise of any discretion — executive or judicial — results in the making of a decision, and no amount of intellectual gymnastics can produce an opposite conclusion.

[10] (At p 532 of the Report):

> Even the law as it stood in the early states of its development, appears to provide an adequate answer to the argument put forward by counsel. I refer, of course, to the judgment of *Abdoolcader J* (as he then was) in *Mak Sik Kwong v Minister of Home Affairs, Malaysia* (No l) [1975] 2 MLJ 168, in which appears (at p 172) the following summary of the law:
>
> > 'Certiorari and prohibition may now issue in proper cases to a body which exercises functions that are analytically and ostensibly administrative and which is not even required to act judicially in the performance of those functions

(*Ridge v Baldwin* [1964] AC 40). *The obligation to act judicially in accordance with the principles of impartiality and fairness may be incurred by a body exercising discretionary administrative powers which seriously encroach on individual interests* (*Durayappah v Fernando* [1967] 2 AC 337). In *R v Woodhouse* [1906] 2 KB 501, Fletcher Moulton LJ in his judgment (at p 535) stated that it is well established that certiorari will issue to a body which would not ordinarily be called a court nor would its acts ordinarily be term 'judicial acts' and that in this context the term 'judicial act' is used in contract with purely ministerial acts. He went on to state that in general a judicial act was one which involved 'the exercise of some right or duty to decide' a question affecting individual rights 'in order to provide scope for a writ of certiorari at common law'.

It has also been held that it is enough in order for certiorari or prohibition to lie for the competent authority to be under a duty to act fairly (*R v Liverpool Corp, ex p Liverpool Taxi Fleet Operators' Association* [1972] 2 QB 299 — a leading case on the implied duty to act fairly). In *R v Birmingham City Justice, exp Chris Foreign Foods (Wholesalers) Ltd* [1970] 1 WLR 1428, Lord Parker CJ stated (at p 1433) that a justice acting under the procedure of the Food and Drugs Act 1955, even though acting in an administrative or executive capacity, was obliged to act fairly and impartially.

It would seem therefore no longer necessary to show that the function was essentially of a judicial nature (*Ridge v Baldwin; Duravappah v Fernando*) or that the person or body making the decision was under an express or even an implied duty to follow a procedure analogous to the judicial (*R v Manchester Legal Aid Committee, exp Brand (RA) & Co Ltd* (1952) 2 QB 413. It will be sufficient if there is an obligation to decide questions of law or fact affecting individual rights and exercise a judicial or limited discretion. A purely administrative or executive function is one where there is no duty to afford a hearing to the parties interested, and where the decision can be made on the basis of policy considerations only."

Even in arriving at an administrative decision, there may be a judicial or quasi-judicial interlude, and at that stage the deciding authority will have to act in a quasi-judicial manner — a situation resolving in effect into a hybrid mixture of administrative and quasi functions where the two elements are intermingled closely. (Emphasis added.)'

[11] It is clear, therefore, that in exercising his powers under s 20 of the Act, the first respondent Minister takes a 'decision' and such decision is subject to review by the courts. If such 'decision' requires the Minister to make a determination on the threshold jurisdiction of the Industrial Court, it must be correct in law. Otherwise, it is liable to be quashed. To accept the second respondent's submissions would, effectively mean that the Minister has no real discretion in referring a complaint to the Industrial Court (it being purely 'administrative' in nature) and the Minister can do so without taking into account relevant factors including the important question of whether the Industrial Court has the necessary jurisdiction to hear the reference. His decision would, effectively be reduced to simply that of a 'transit point', from Director General to the Industrial Court, which is clearly incorrect in law.

[12] In the instant case, where the legality of the first respondent Minister's decision, under a statutory provision ie s 20 of the said Act, is being challenged (ie whether the Industrial Court has the jurisdiction to hear the reference), the well established principles developed by the courts, in the area of the administrative law, would apply and provide the relevant test for determining

the issue. In determining whether the first respondent Minister correctly decided the issue of threshold jurisdiction, the test that should properly be applied is the test as to whether the first respondent Minister acted 'lawfully' in coming to his decision. In this regard, the House of Lords' decision in *Padfield and others v Minister of Agriculture, Fisheries and Food and others* [1968] AC 997, where the Minister's powers and court's right to intervene were explained in the following terms by Lord Upjohn at p 1058:

> So it is clear that the Minister has a discretion and the real question for this House to consider is how far that discretion is subject to judicial control.
>
> My Lords, upon the basic principles of law to be applied there was no real difference of opinion, the great question being how they should be applied to this case.
>
> The Minister in exercising his powers and duties, conferred upon him by statute, can only be controlled by a prerogative writ which will only issue if he acts unlawfully. Unlawful behavior by the Minister may be stated with sufficient accuracy for the purposes of the present appeal (and here I adopt the classification of Lord Parker CJ. in the Divisional Court): (a) by an outright refusal to consider the relevant matter, or (b) by misdirecting himself in point of law, or (c) by taking into account some wholly irrelevant or extraneous consideration, or (d) by wholly omitting to take into account a relevant consideration.
>
> There is ample authority for these propositions which were not challenged in argument. In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings I have mentioned.

[13] The above passage was cited with approval in the Supreme Court decision of *Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal* [1991] 1 MLJ 24 and the decision in *Padfield* referred to in *Hong Leong Equipment Sdn Bhd v Liew Fook Chan* [1996] 1 MLJ 481 where the Court of Appeal cited the same as authority for the proposition that the Minister's discretion under s 20 of the said Act is not unfettered and is liable to be quashed by the court if the Minister exceeds his jurisdiction. If, therefore the applicant can establish either:

(a) there was an outright refusal by the first respondent Minister to consider a relevant matter;

(b) a misdirection by the first respondent Minister on a point of law;

(c) the first respondent Minister took into account a wholly irrelevant or extraneous consideration; or

(d) the first respondent Minister omitted to take into account a relevant consideration;

that his decision to refer the representation to the Industrial Court is liable to be quashed by this court.

[14] It would be noted, in the present instance, the applicant had raised two specific issues pertaining to the threshold jurisdiction of the Industrial Court at the conciliation proceedings. The first respondent Minister, in his affidavit in reply of 18 October 2002, set out the basis and ground on which

he decided to refer the representation to the Industrial Court. I think it is clear from the first respondent Minister's affidavit that the first respondent had completely omitted to deal with and decide on the specific threshold jurisdiction issue posed ie whether the second respondent, having been removed by way of two resolutions, passed at the Extraordinary General Meeting of the applicant, can challenge the removals by way of reference under s 20 of the said Act. This issue was specifically raised in the applicant's written representation at the conciliation proceedings. The failure by the first respondent Minister to consider and determine the said issue, in any manner, is, with respect, a clear error of jurisdiction on the first respondent Minister's part which in itself, necessitates intervention by this court. In *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337, the Federal Court upheld a decision to quash the decision of the Minister of Human Resources when it concluded that the Minister's affidavit failed to indicate that the Minister had directed his mind to substantial points of law or formed any reasoned view on those points of law raised by the parties which was in respect of a decision of the Minister under s 9 of the said Act. These considerations, similarly apply in the present case where the first respondent Minister, with respect failed to direct his mind to the threshold jurisdiction issue raised by the applicant nor set out in his affidavit any view for declining to accept the applicant's contention. Had the first respondent Minister properly directed himself to the issue, he would have concluded that the Industrial Court would have no jurisdiction to determine a removal by way of vote of shareholders for the following reasons:

(i) I am of the opinion that where there is a decision of shareholders to remove a person from positions held in a company, such decision cannot be the subject of adjudication by the Industrial Court and to do so would be to exceed its jurisdiction;

(ii) On a consideration of the court to consider the relevant facts set out in the applicant's affidavit which set out the background of the removal of the second respondent by shareholders of the applicant at paras 17 and 18;

(iii) This case presents a novel and unusual situation where the position of the second respondent in the applicant was determined by way of a vote of shareholders taken at an Extraordinary General Meeting of the applicant. It is I think, the first time a removal of a director/executive by shareholders at a general meeting is being challenged by way of a s 20 reference under the said Act.

[15] Section 20 of the said Act, on its express terms, empowers the Industrial Court to adjudicate a 'dismissal' between an 'employer' and a 'workman'. The Industrial Court, being a creature of statute, must act strictly within the powers expressly conferred upon it. In *Kathiravelu Ganesan* the following was stated with regard to the position of the Industrial Court at p 691:

> The respondent's argument in support of its case may be put in this way. The Industrial Court is a creature of statute. It therefore only has such jurisdiction as is conferred upon it, either expressly or by necessary implication, by the statute creating it, namely the Act.

[16] This section does not, on its express terms, entitle the Industrial Court to enquire into and adjudicate upon what is essentially an issue of company law, ie the rights of shareholders to remove a director and/or officer of a company and enquire into the basis or otherwise of such decision taken at such meeting of shareholders of a company. Such a removal by shareholders taken by way of resolution of a general meeting of a company cannot amount to a 'dismissal' within the meaning of s 20 of the said Act. The jurisdictional difficulties faced by the Industrial Court, if it is to proceed with the reference, will, with respect, arise in the following respects:

(i) Firstly, in general, any decision taken by shareholders at a general meeting of a company may not be impugned in law save and except in cases of fraud or illegality in the convening and conduct of the meeting itself. (See *Life Insurance Corporation v Escorts Ltd & Ors* AIR 1986 SC 1370);

(ii) The Industrial Court does not possess the requisite jurisdiction to adjudicate upon such issues which, by their very nature, fall outside the scope of the s 20 inquiry and lie, if at all, with the jurisdiction of the Civil Courts. Further, the courts, as a rule, will not enquire into the question of whether there was reasonable cause for removal of a director that being a matter within the province of shareholders voting at a duly convened meeting of the company (*Life Insurance Corporation v Escorts Ltd & Ors*).

(iii) Further, it was held in that case that the director/officer, having elected to go before the shareholders of a company and to present representations why he ought not to be removed cannot, when the vote of the shareholders goes against him, then attempt to impugn that decision;

(iv) In the present case, it would be noted that the second respondent presented a detailed written representation at the Extraordinary General Meeting of the applicant setting reasons why he ought not to be removed for consideration of the shareholders (at pp 260-279 of Vol II of the applicant's affidavit in support). Having elected to take his case to the shareholders of the applicant and having had the opportunity, to present both written and oral representations to the shareholders, the second respondent cannot now, with the decision of the shareholders having gone against him, seek to challenge the decision indirectly under s 20 of the said Act;

[17] Secondly, if the Industrial Court were to treat the removal as 'dismissal', in law, the Industrial Court is under a duty to inquire into the question of whether such dismissal is without just cause or excuse under s 20 of the said Act. In *Goon Kwee Phoy v J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129, the Federal Court stated as follows on the issue at p 136:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the

reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

[18] In the present instance, the removal of the second respondent from his respective positions was by shareholders exercising their right to vote at an Extraordinary General Meeting of the applicant. In law, the shareholders are under no duty to furnish a reason for voting for or against a particular resolution tabled at a general meeting. The position of a shareholder exercising his vote at a general meeting of a company is set out in the decision of *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd & other appeals* [1996] 1 MLJ 661 where the Court of Appeal endorsed the principles in *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 2 All ER 625 that:

(i) the shareholders' power to vote in a general meeting is not a fiduciary power and a shareholder owes no duty to anybody as to how he exercises his vote;

(ii) that a shareholder casting his vote in a general meeting is not casting it as agent of the company in any form or shape and may vote in any manner he pleases;

(iii) any decisions taken at a general meeting and resolution passed thereof by shareholders are decisions taken by and resolutions passed by the members of the company which is, in law, separate and distinct from the company although the decision of the shareholders binds the company. In short, the acts of the shareholders are not the act of the company;

(iv) the following passage in the judgment of the court of *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 2 All ER 625 and referred to and adopted by the Court of Appeal in *Tuan Haji Ishak* is instructive at p 635:

> Putting this into less formal language, what counsel for the directors submitted was that although it is perfectly true that the act of the members in passing certain special types of resolutions binds the company, their acts are not the acts of the company. There would, he submitted, be no real doubt about this were it not for the use of the curious expression 'the company in general meeting' — which, in a sense, drags in the name of the company unnecessarily. What that phrase really means, he submitted, is 'the members (or corporators) of the company assembled in a general meeting', and that if the phrase is written out in full in this manner it becomes quite clear that the decisions taken at such a meeting, and the resolutions passed thereat, are decisions taken by, and resolutions passed by, the members of the company, and not the company itself. They are therefore in the position of strangers to the order and not in contempt by their act in voting as they please, whatever its effect may be.
>
> In my judgment, these submissions of counsel for the directors are correct. I think that in a nutshell the distinction is this. When a director votes as a director for or against any particular resolution in a directors' meeting, he is voting as a person under a fiduciary duty to the company for the proposition that the company should take a certain course of action. When a shareholder is voting for or against a particular resolution he is voting as a person owing no fiduciary duty to the company who is exercising his own right of property to vote as he thinks fit. The fact that the result of the voting at the meeting (or a subsequent poll) will bind the company cannot affect the position that in voting he is voting simply as an exercise of his own property rights.

Perhaps another (and simpler) way of putting the matter is that a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors; a shareholder who casts his vote in general meeting is not casting it as an agent of the company in any shape or form. his act, therefore, in voting as he pleases cannot in any way be regarded as an act of the company.

(v) This is of significance in the instant case as, under s 20 of the said Act, the Industrial Court can only adjudicate on a dismissal between a 'workman' and an 'employer'. If the 'employer' of the second respondent, in this case, is to be taken as the applicant company (on the assumption that the second respondent is a 'workman' and which is not the case) then the removal, having been determined by the shareholders who are, in law, separate and distinct from the company, cannot be the subject of adjudication by the Industrial Court as they are not parties to whom the Industrial Court may exercise jurisdiction over;

(vi) The Industrial Court would accordingly, be acting in excess of its jurisdiction, in seeking to enquire whether a dismissal is without just cause or excuse if it proceeds to adjudicate on the basis on which the shareholders exercised their vote on a particular resolution when such shareholders are not required, in law, to give reasons.

[19] Thirdly, it is well established that in bringing a claim under s 20 of the said Act, a claimant must seek an order of reinstatement as otherwise, he cannot maintain such an action (see *Holiday Inn, Kuching v Lee Chai Siok Elizabeth* [1992] 1 MLJ 230). I think that an order of reinstatement (which is in the nature of a statutory injunction), is incompatible with the scheme set out in the Companies Act 1965 that shareholders must be allowed to determine the affairs of a company including any question on the removal of a officer/director. Any award of reinstatement would negate such principle which is well established in company law and compel the shareholders, against the wishes expressed by way of a vote at a general meeting to re-engage an officer/director they have deemed should be removed. In the circumstances, I am of the view that the Industrial Court would be exceeding its jurisdiction if it is allowed to hear the reference. It would be noted that the first respondent Minister did not address, in his Affidavit, this central issue notwithstanding both the applicant and second respondent had specifically referred to the same in making their respective written representations at the conciliation proceedings. (This may be found at exh 'SMS–10' of the applicant's affidavit and exh 'JN–11' to the second respondent's affidavit.) In these premises, Iconclude that the first respondent Minister's failure to address the specific issue of threshold jurisdiction has resulted in the decision being vitiated and that the orders sought should, accordingly, lie.

[20] As to the threshold jurisdiction issue posed to the first respondent Minister ie whether the second respondent was a 'workman' or not, it is clear from the first respondent Minister's affidavit of 18 October 2002 that the first respondent Minister misdirected himself in law in dealing with the issue. Inparticular, it would be noted that the first respondent Minister held that the issue of the workman 'can only be determined by the Industrial Court' (at para 10 of the first respondent Minister's Affidavit). This is a misdirection

in law, following the Supreme Court decision in *Kathiravelu Ganesan* which requires the Minister to determine such issues if a challenge is taken on threshold jurisdiction and not decline determining the issue by referring the same to the Industrial Court. In this regard, the Industrial Court may only proceed to adjudicate a representation by a 'workman' within the meaning of the said Act. If the complainant is not a 'workman', then the Industrial Court cannot proceed to hear the reference, as to do so would be to act in excess of jurisdiction. This is a 'threshold' jurisdiction issue which must be determined prior to the Industrial Court embarking upon its enquiry into the merits of the dismissal complaint. In this regard, the first respondent Minister, in coming to his decision, proceeded to take into account matters which were not relevant to the question of the threshold jurisdiction of the Industrial Court, particularly at paras 9 of his affidavit when the first respondent Minister concluded 'the dismissal of the second respondent was not made on grounds supported by convincing evidence to show that the second respondent was responsible for the reduction of the Company's business'. That issue (which was a matter for shareholders at the meeting to decide) clearly is extraneous to the legal threshold jurisdiction question and the first respondent Minister, by alluding to the same as a basis for reference to the Industrial Court, has clearly exceeded his jurisdiction. If the first respondent Minister had properly directed himself in law, he would come to the conclusion that the second respondent was not a 'workman' under the said Act. The test of who is a 'workman' under the said Act, has been the subject of a number of decisions of the superior courts. The first is the Federal Court decision of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 where the Federal Court held that the most important but not the sole criteria in determining who is a 'workman' is the 'control' test (a test commonly utilised by the courts at common law to determine whether a party is working under a contract of service or not). If that test were to be applied to the position of the second respondent, then it can be seen that the second respondent cannot be considered a 'workman'. It is undisputed, on the facts here, that the second respondent was not subject to any form of detailed control as to the manner in which he exercised his functions and responsibilities as President and Chief Executive Officer, Managing Director and Director of the applicant. The discretion is left to the second respondent as to the manner in which he discharged his responsibilities was also consistent with the position of seniority be held in the applicant. This is to be found in paras 10 to 15 of the applicant's affidavit in support.

[21] I am of the opinion that the submission of the first respondent Minister is not in accord with the position taken on his affidavit on the threshold jurisdiction question as to whether the second respondent was a 'workman' within the meaning of the Act. In particular, it would be noted that at para 10 of his affidavit of 18 October 2002, the first respondent Minister took the position that the issue whether the second respondent is a 'workman' is a 'mixed question of law and fact which can only be determined by the Industrial Court'. The first respondent Minister appears to have concluded that the second respondent was, in fact, a 'workman' and proceeding to recite facts in support of such conclusion. The first respondent Minister's submitted that 'fakta-fakta yang menunjukkan responden kedua adalah seorang pekerja ada

berikut ... .' and proceeds to cite facts in support of such conclusion. I think the first respondent Minister is bound by the position taken in his affidavit in reply. The first respondent Minister did not allude to the specific facts in his affidavit on the 'workman' issue which he considered as relevant (or irrelevant) and may not now seek to refer and rely on such unspecified facts. The importance of the Minister's Affidavit and its contents was emphasised in the Supreme Court decision of *Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal* [1991] 1 MLJ 24 at p 29:

> The question is how should these principles be applied to the instant case? In this regard Lord Roskill's statement in *Congreve v Home Office* [1976] 1 QB 629 at p 657 is apt:
>
> > 'Nothing I am about to say goes in any way outside or beyond what was authoritatively laid down in those cases. But the law does not stand still, and those cases, while stating the relevant principles, leave open their application to the particular facts of particular cases which from time to time come before the court's.'
>
> In our view this question must be solved aliunde by examining the facts upon which the Minister expressed himself as satisfied that it was not expedient for him to refer the trade dispute to the Industrial Court. It is therefore convenient to look at the facts of this case.

[22] The above passage was cited in the decision of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and Anor appeal* [1996] 1 MLJ 481 at p 538 where the Court of Appeal, in considering the duty of the Minister to give reasons under s 20 of the Act, stated as follows:

> Of course, he may not be procedurally compelled to furnish them: see *Sanjiv Oberoi*. But if he gives no reasons or inadequate reasons, then, it is open for a court to conclude that he had no good reasons for making the decision he did. The reasons he gives are, of course, subject to curial scrutiny for the purpose of determining whether he had exercised his discretion in accordance with law.

[23] Similarly, in *Menteri Sumber Manusia v Association of Bank Officers, Peninsular Malaysia* [1999] 2 MLJ 337 at p 366, the following was stated with regards to the Minister's affidavit:

> With respect, in our view, the reasons given by the Minister for his decision under s 9(5), as they appear in his affidavit aforesaid, are not adequate for, apart from a bare denial (see para 12 of his affidavit quoted above), there is no suggestion in them that he had directed his mind to the substantial points of law which had been raised by ABOM or formed any reasoned view about them. We need hardly add that we are in no position to speculate as to how the Minister would have dealt with these points of law had he directed his mind adequately to them.

[24] The courts have, consistently, in determining the issue of whether the Minister exercised his discretion correctly or not under the provisions of the Act, proceeded to consider the affidavit of the Minister. It is the affidavit of the Minister which is the basis upon which the court determines whether the Minister exercised his discretion lawfully or not. If, therefore, the affidavit of the Minister takes a particular position and refers to very limited facts (as in the instant case), it is that position and those specific facts, on affidavit, upon which the issue would need to be decided. In the circumstances, I think the first respondent Minister's submission on the issue ought not to be considered

as those submissions do not reflect nor accord with the first respondent Minister's affidavit filed in these proceedings. Thus, by applying the principles postulated in *Hoh Kiang Ngan* by the Federal Court, I conclude that the second respondent was not a 'workman' under the said Act. It would be noted that the second respondent, in his affidavit, attempted to set out instances where he was required to report to the Board of Directors of the applicant or specific Board members. The second respondent's affidavit simply confirms that such instances of reporting were specific and limited and is consistent of a top executive in an organisation. What is clear is that the second respondent had full control and power to run the applicant organisation on a day to day basis and was fundamental in formulating role and implementing policies of the applicant. Further, the second respondent, by virtue of his top level management positions in the applicant, represented the 'directing mind and will of the applicant', both in the formulation, implementation and execution of the applicant's policies and was also fully empowered and authorised to run the applicant on a day to day basis in all key areas of administration, operations, sales, information technology and finance subject to his reporting to the Board of Directors of the applicant on a limited basis. He was, therefore, at the very apex of the applicant's management.

[25] The Supreme Court in *Inchcape Malaysia Holding Bhd v RB Gray & Anor* [1985] 2 MLJ 297 decided that a director of the company who is regarded as representing the directing mind and will of the company is not a 'workman' under the Act. On this basis, and without more, I think the second respondent who was a director of the Applicant, cannot be regarded as a 'workman' for the purposes of the said Act. In the instant case, the second respondent, apart from being a director on the Board of the applicant, held the top executive/management position in the applicant company, and hence, cannot be considered, in law a 'workman'. His position placed the second respondent in a position of authority in the corporation that employed him, a factor recognised in *Hoh Kiang Ngan* as a material consideration in determining who is a 'workman'. In this regard, in the context of company directors and those holding executive positions, the test in *Inchcape v Gray* continues to apply although the decision itself in *Inchcape* was formally overruled in *Kathiravelu Ganesan* . The reason is that the earlier Federal Court decision in *Hoh Kiang Ngan* specifically held that such a test could apply if the complainant was, in fact, a director of the company under which he was employed (which was not the case in *Inchcape*). Gopal Sri Ram HMR stated on this issue in *Hoh Kiang Ngan* as follows at p 380:

> Third, there is the fact that Gray was never appointed as a director of Inchape. There was no resolution to that effect nor a director's service contract. When this was drawn to his attention during argument, counsel for the respondent submitted that it was the purpose for which Gray was employed that was important and not the identity of his employer. With respect, this submission misses the point that under the Act, the identity of the employer is a matter of vital importance. Further, what is of moment is that Gray's designation as director did not place him in any position of authority in the corporation that employed him.

[26] In the instant case, unlike *Inchcape*, the second respondent's various designations placed him in a position of clear authority in the corporation that

employed him ie the applicant. Therefore I am of the opinion that whether the 'control' test or the 'directing will and mind of the Company' test is applied, it is clear that the second respondent was not a 'workman' within the meaning of the said Act.

[27] The first respondent Minister has purported to refer the 'control' test set out in the Federal Court decision of *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 in determining the issue of whether a person is a 'workman' under s 20 of the Act and as defined under the Act. It would appear that the first respondent Minister has taken the 'control' test as the sole and exclusive test in seeking to determine the 'workman' issue. This is incorrect since the Federal Court, in *Hoh Kiang Ngan* itself, recognised that the control test is 'an important factor although it may not be the sole criterion'. In this regard, the Federal Court emphasised it is necessary to determine 'all features of the engagement' in determining whether a person is a workman or not ie to consider all relevant circumstances and factors of the engagement and not merely the terms of the written contract. In the instant case, the first respondent Minister has fallen into error on the issue by referring and relying on the terms of the written contract of the second respondent which deal with such issues such as basic pay, probation, increment, annual leave, EPF contributions, retirement benefits and notice of termination when those matters do not go to the important question of duties and functions of the second respondent's engagement. That question can only be determined by examining the role of the second respondent in the running and management of the applicant's organisation as its President and Chief Executive Officer. Further, it is important to stress the role, duties and functions of the second respondent are not set out in any detail in the written contract of the second respondent but which has been set out in the applicant's affidavit in support at paras 10 to 15 based on the actual running of operations of the applicant. It is clear, from a reading of the first respondent Minister's submission, that he has omitted to consider these key features which show the applicant had full control over the day to day running and operation of the applicant and was also instrumental in the formulation and implementation of policies with limited reporting to the Board of Directors of the applicant on such issues. Further, the first respondent Minister's contention that the second respondent had 'no authority' to carry out any plans and policies, if not approved by the Board of Directors and was subject to the 'control of the Board', is misconceived and unsupported by the facts set out in the applicant's affidavit in support. These facts were not disputed nor commented upon by the first respondent Minister in his own affidavit and, hence, the first respondent Minister cannot now seek to assert otherwise. It is further shown that the first respondent Minister has misapplied the 'control' test set out in *Hoh Kiang Ngan.* In particular, it would be noted that the 'control' test in *Hoh Kiang Ngan* referred specifically to the nature, degree and extent of control in which the job functions are carried out and not merely to a general reporting/approval function (such as to the Board of Directors, as in the instant case) on a periodic basis. Such general reporting/approval on a periodic basis does not constitute 'control', as envisaged in the decision of *Hoh Kiang Ngan*. If the test in *Hoh Kiang Ngan* is properly applied, all features of the engagement must be considered. In this regard,

the fact that the second respondent's position, as President and Chief Executive Officer, could only be removed by sway of a resolution of shareholders of the applicant, was a relevant factor, given the power of removal is an important, if not critical, feature of any engagement. This is particularly so where the element of 'control' is being considered. In the instant case, it must be emphasised removal of the second respondent's position, as President and Chief Executive Officer, lay with the shareholders and not the Board of Directors of the applicant. It is, therefore, incorrect to attempt to contend that the second respondent had two 'separate and distinct roles' ie that of director and that of Chief Executive Officer when in both cases, the power of removal was governed by the shareholders of the applicant. Similarly, the issue of whether the second respondent was 'the directing mind and will' of the applicant (as was held in *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297) is a relevant factor in determining the overall features of the second respondent's engagement. In particular, in *Hoh Kiang Ngan*, the Federal Court endorsed the position that where the party's designation as a director places him in a position of authority in the corporation that employs him, that is a relevant factor to consider whether such person is to be regarded as a 'workman' or not. In the instant case, the fact the applicant held the key and pivotal top executive positions in the applicant company ie as President and Chief Executive Officer where he was in a position to assert authority over the affairs of the applicant, would be a relevant factor in determining the 'workman' issue. This, unfortunately, was not considered by the first respondent Minister. The second respondent takes the position that the question of whether the second respondent is a 'workman' or not is a question of law and fact and should be decided by the Industrial Court. Ithink there are a number of inherent difficulties in this contention of the second respondent. Firstly, it would be noted that the first respondent Minister has, in his submission, sought to actually conclude the question of the 'workman' as opposed to deciding to refer the issue to the Industrial Court as earlier stated in his affidavit. If that is the position of the first respondent Minister, then the entire submission of the second respondent is inconsistent with the stand taken by the first respondent Minister in his submission. Secondly, none of the cases cited by the second respondent on this issue dealt with a direct challenge to the Minister's reference on the threshold jurisdiction of whether a party was a 'workman' or not and, hence, are of little assistance. In the instant case, the Minister must decide the threshold jurisdiction question posed and not relinquish that duty by seeking to refer the matter to the Industrial Court. It is also incorrect to state that only the Industrial Court may determine questions of law and fact. The Industrial Court's powers to examine and adjudicate questions of law and fact are premised on the Industrial Court having the jurisdiction to do in the first place. If that jurisdiction issue is challenged, at the outset, by challenging the Minister's reference, as in the instant case, it is incumbent on the Minister to decide the jurisdiction issue. The second respondent has attempted to set out facts to show that the second respondent was 'subjected to a high degree of control by the applicant'. If those 'facts' referred to by the second respondent are considered, it would be noted that they do not pertain to the 'control' issue but instead are limited to 'supervision' and 'reporting' functions. This is a

misreading of the 'control' test which refers to the power of control over the manner of doing work and not 'reporting' and 'supervision' functions (see *Kuala Lumpur Mutual Fund Bhd v J Bastian Leo & Anor* [1988] 2 MLJ 526). In the instant case, it is undisputed that as President, Chief Executive Officer and Managing Director of the applicant, the second respondent had full and complete control over the manner in which he exercised his functions. In the result, the contentions of the second respondent cannot be accepted.

[28] The first respondent Minister's contention that resolutions passed reflect the collective will of a company which bind the company are not anaccurate statement of law in the context of the issues which require determination. In *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, it was submitted that the principle that the vote of shareholders at a meeting of a company is not to be regarded as an act of a company was endorsed by the Court of Appeal. As the first respondent Minister has not sought to distinguish nor comment on the case of *Tuan Haji Ishak*, he must be taken to accept that proposition as correctly representing the legal position in the instant case. Similarly, the reference to the letter of 'termination' of the applicant's services (exh 'SMS–9') is incomplete. If the letter is examined, it would be noted that it refers specifically to the shareholders' resolution for removal of the second respondent passed at the Extraordinary General Meeting of the applicant and which resulted in the letter of 9 January 2001 being issued. What is critical is that it was the shareholders' resolution of 5 January 2001 which resulted in the second respondent bringing his complaint under s 20(1) of the Act and not the letter of 9 January 2001, as sought to be contended by the first respondent Minister. Similarly, the reference to the case of *Inchcape Malaysia Holdings Bhd v RB Gray & Anor* [1985] 2 MLJ 297) for the proposition that there is no difference between termination by notice and a summary dismissal, is irrelevant as that is not the issue in the instant case. Similarly, no question of removal by way of shareholders' resolution (and its implications in law), arose in *Goon Kwee Phoy*. This is an issue which is for the court to determine based on the relevant case authorities including the importance of upholding the sanctity of the shareholders' vote at a meeting of a company and right of such shareholders to determine the affairs of a company. The issue for determination is a 'threshold jurisdiction' issue and not a determination of the merits of the second respondent's complaint. The omission of the first respondent Minister to accept the established right of shareholders to remove a director/officer of a company without being obliged to give a reason for so voting is, a confirmation that the first respondent Minister has misdirected himself in law and accordingly exceeded his jurisdiction in making his decision.

[29] In dealing with the issue of excess of jurisdiction or taking into account irrelevant factors, it would be noted that the first respondent Minister has not sought to refer to the Supreme Court decision of *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685 which I think must be taken as the leading case on the question of a challenge to the threshold jurisdiction of the Industrial Court and the related question of a Minister's powers of reference under s 20 of the Act. The previous decisions pertaining to the Minister's powers under s 20 of the Act including the decisions of the *Minister*

of Labour, Malaysia v Lie Seng Fatt [1990] 2 MLJ 9 and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, did not specifically deal with the question of threshold jurisdiction and, therefore, must be read in the light of the Supreme Court decision in *Kathiravelu Ganesan.* Even if the tests in *Lie Seng Fatt* and *Hong Leong Equipment* are applied in the instant case, it is clear that the Minister exceeded his jurisdiction by misdirecting himself in law, and taking into consideration irrelevant factors (the test in *Lie Seng Fatt*) and further that the nature of the second respondent's complaint, being clearly outside the scope and ambit of s 20 of the Act, was 'frivolous and vexatious representation' (the *Hong Leong Equipment* test) and ought not to have been referred to the Industrial Court. The most appropriate test in determining the Minister exceeded his jurisdiction in exercising his powers under s 20 of the Act is the 'lawful decision' test, as set out in the decision of *Padfield and others v Minister of Agriculture Fisheries and Food and others* [1968] AC 997, referred to in the Supreme Court decision of *Minister of Labour, Malaysia v National Union of Journalists, Malaysia and another appeal* [1991] 1 MLJ 24 and also where a decision of the Minister may be described as an 'unreasonable decision' in administrative law as was held in the case of *Association Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 which was cited with approval by the Court of Appeal in *Hong Leong Equipment.* The contentions of the first respondent Minister indicate that the first respondent Minister failed to consider or, alternatively, properly consider all relevant facts raised at the conciliation proceedings, particularly facts raised by the applicant but instead, gave undue weight to matters such as the second respondent's written contract when that document was neither decisive nor material in determining the threshold jurisdiction issues posed for consideration for the first respondent Minister.

[30] In summary, I would state that the first respondent Minister has a duty, in law, to consider and decide all questions pertaining to the threshold jurisdiction of the Industrial Court. When such questions of threshold jurisdiction are raised by a party under s 20 of the said Act, the first respondent Minister must specifically address and decide the questions and such decision must be correct in law. In the instant case, the first respondent Minister failed to decide the specific question of threshold jurisdiction posed to him and further misdirected himself in law, of the threshold jurisdiction posed and took into account irrelevant matters in making his decision. For these reasons I grant order in terms of (1), (2) and costs of the application.

Applications allowed.

Reported by Lim Lee Na